Due service of the within Petition for Writ of Certiorari and Brief in support thereof is hereby acknowledged this.....day of July, A. D. 1938.

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Counsel for Respondents.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM 1938.

No. 210.

THE PULLMAN COMPANY, a corporation, H. J. HATCH, EDWARD E. MYERS and A. J. KASH,

Petitioners,

vs.

MRS. GARNETT V. JENKINS and ROBERT W. JENKINS, by MRS. GARNETT V. JENKINS, Guardian *Ad Litem*,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER THE PULLMAN COMPANY.

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SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

CASES. PAGE

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Foreword.

Feeling that the action of the Circuit Court of Appeals in reversing the judgment of the District Court and directing that the case be remanded to the state court on the asserted ground that the District Court was without jurisdiction to hear the case has been amply argued in petitioners' brief in support of their petition herein, and that further to discuss this angle of the case would be a mere work of repetition and supererogation, the petitioner, The Pullman Company, hereby elects to stand upon such brief to that extent.

In view, however, of the assumption that this court will, in the event of a reversal of the judgment of the Circuit Court, consider and pass upon the merits of the action and direct such disposition of the case as that court might and, we respectfully contend, should have made of it upon the appeal from the District Court, we desire herein further to discuss and elaborate Point XI of the argument in our former brief.

For the convenience of the court we here repeat such point and the argument thereunder as follows:

POINT XI.

Had the Circuit Court Considered the Case On Its Merits the Judgment of the District Court Would Have Been Affirmed.

This point is urged upon the authority of *Story Parchment Company v. Paterson Parchment Paper Company*, 282 U. S. 555, which holds that on writ of certiorari to review a judgment of a Circuit Court of Appeals, the entire record is before this court, with power to review the action of the Circuit Court of Appeals and direct such disposition as that court might have made of it upon the appeal from the District Court. The judgment and opinion of the District Court (17 Fed. Supp. 820) was correct and is approved by Circuit Judge Mathews in his dissenting opinion. [96 Fed. (2d) 405, Tr. p. 157 *et seq*.] In view of this court's decision in the recent case of *Erie Railroad Co. v. Harry J. Tompkins*, ... U. S. ....., 82 L. Ed. 787, decided April 25, 1938, we call attention to the fact that the decision of the District Court is in accord with the local law. The latest decision of the California

courts on the subject is found in the case of *Lewis v. Johnson,* 93 Cal. App. Dec. 638, 80 Pac. (2d) 90, decided May 27, 1938. This decision conclusively establishes that a covenant not to sue, coupled with a dismissal, constitutes a release.

Summary Statement of the Matter Involved.

On December 21, 1936, the plaintiffs executed and acknowledged a document entitled a "Covenant Not to Sue" and reading as follows:

> "The undersigned, Mrs. Garnett V. Jenkins, and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian *ad litem,* of the City of Los Angeles, County of Los Angeles, State of California, for our heirs, executors, administrators and assigns, in consideration of twenty-five hundred dollars ($2500.00) paid by Southern Pacific Company, a corporation, the receipt of which is hereby acknowledged, do by this instrument covenant with the said Southern Pacific Company, a corporation, and Fred M. Dolsen, forever to refrain from instituting, pressing or in any way aiding any claim, demand, action, or cause of action for damages, costs, loss of service, expense or compensation for, on account of, or in any way growing out of, or hereafter to grow out of, the injury or death of Robert L. Jenkins, deceased, husband of the said Mrs. Garnett V. Jenkins, and father of the said Robert W. Jenkins, occurring on the 29th day of March, 1935, or his said death on the 19th day of April, 1935, while in the employ of the said Southern Pacific Company, a corporation, as passenger conductor or otherwise, and running between various points and particularly on the 29th day of March, 1935, between Los Angeles, California, and San Luis Obispo, California, in which the said Robert

L. Jenkins claimed to have received a blow on the head from one, A. J. Kash, and it is alleged that the said Robert L. Jenkins, deceased, died as a result of said blow by the said A. J. Kash on the 29th day of March, 1935, or from any other injury or cause while in the employ of Southern Pacific Company, a corporation, or otherwise, which cause or causes are mentioned in that certain action entitled In the District Court of the United States, Southern District of California, Central Division, Mrs. Garnett V. Jenkins and Robert W. Jenkins by Mrs. Garnett V. Jenkins, his guardian *ad litem*, plaintiff, vs. Southern Pacific Company, a corporation, *et al.*, No. 7421-Y, or from any cause or causes, whether set forth in said complaint as aforesaid or otherwise, or at any time from the beginning of the world to the date of this instrument, reserving to the undersigned all rights that they, or either of them, may now have or hereafter have against any other person or persons, firms or corporations, because of the death of the said Robert L. Jenkins, deceased.

"It is further agreed that the undersigned, Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian *ad litem*, and the Southern Pacific Company, a corporation, do not in any manner or respect waive or relinquish any claim or claims against any other person, persons, firms or corporations than are herein specifically named, and it is further understood that said Southern Pacific Company, a corporation, does not in any manner or to any extent admit any liability or responsibility for the above claimed damages, or the consequences thereof, and that the execution of this document shall not be in any manner construed contrary to the provisions of this paragraph herein specified.

"In Witness Whereof, the undersigned have hereunto set their hands this 21st day of December, 1936.

"Mrs. Garnett V. Jenkins
"and Robert W. Jenkins, by
"Mrs. Garnett V. Jenkins
"his guardian *ad litem*.

"State of California, County of Los Angeles—ss.

"On this 21st day of December, A. D., 1936, before me, L. H. Phillips, a Notary Public in and for said County and State, personally appeared Mrs. Garnett V. Jenkins, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

"In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) L. H. PHILLIPS
Notary Public in and for said County and State."
[Tr. p. 116.]

On December 23, 1936, the plaintiff, Mrs. Garnett V. Jenkins, as administratrix of the estate of Robert L. Jenkins, deceased, filed a petition in the state court probate proceedings stating that she, as administratrix, had filed an action predicated upon an injury to the deceased, and that such action had been removed to the District Court; and that she, as administratrix, had entered into a "Covenant Not to Sue" with the defendant Southern Pacific Company, a copy of which was attached. She prayed for an order confirming said covenant not to sue and permitting her to dismiss said cause as against the Southern Pacific Company. [Tr. p. 119.] On the same day the state court ordered that "the Covenant Not to Sue, entered into by and between Mrs. Garnett V. Jenkins, Administratrix, and the Southern Pacific Company, a corporation, be and is hereby confirmed and that she be per-

mitted to dismiss said cause of action as against Southern Pacific Company, a corporation". [Tr. p. 122.]

On the following day, the trial court dismissed the action as against the defendant Southern Pacific Company and defendant Dolsen, the gate-tender.

On December 29, 1936, defendants The Pullman Company, Hatch, its conductor, Meyers, its porter, and Kash all filed supplemental answers alleging that the so-called "Covenant Not to Sue" released the cause of action stated against them. [Tr. pp. 97, 99, 100 and 103.] The answers were treated as pleas in bar, and trial was had thereon on the same day. The District Court held that the instrument amounted to a release of the cause of action as to all of the defendants. (*Jenkins v. Southern Pacific Company*, D. C. 17 F. Supp. 820.) As herein above stated, Circuit Judge Mathews, in a dissenting opinion agreed with and adopted as his own the trial court's opinion in the case. [Tr. p. 157.] The majority opinion of the Circuit Court failed to pass on the point.

The sole question on the merits is whether the above mentioned document characterized as a "Covenant Not to Sue" was such in fact and in legal effect, or whether such document, coupled with the dismissal and other attendant circumstances constituted a retraxit and release, and, as such, inured to the benefit of all the other joint tort-feasors.

It is noteworthy that the document in question was entered into while the action was pending and that therefore the entitlement thereof as a "Covenant Not to Sue" is meaningless and furnishes absolutely no aid in arriving at the intention of the parties thereto or the legal effect thereof. It is patently a misnomer and should be totally disregarded.

ARGUMENT.

POINT I.

The Document Entitled "Covenant Not to Sue" Was a Retraxit and a Release of Southern Pacific Company and Fred Dolsen, and as Such Effectuated a Release of All the Other Defendants.

The decision of the District Court in this case holding that the so-called "Covenant Not to Sue" inured to the benefit of all of the defendants is, we respectfully submit, in harmony with and fully supported by the decisions of the courts of the state of California.

The rule that a release of one joint tort feasor releases all joint tort feasors is elementary.

Kincheloe v. Retail Credit Co., 4 Cal. (2d) 21;
Bee v. Cooper, 217 Cal. 96.

In determining the effect of the instruments executed between the plaintiffs and defendants, Southern Pacific Company and Dolsen, all of such instruments must be considered as a part of one transaction. They were so treated by the parties. The documents include the so-called covenant not to sue, the petition for its confirmation, the order entered thereon, the dismissal of the action, and the court's order thereon.

As is pointed out in the opinion of the trial court:

"Any release, *retraxit* or abandonment of the cause of action made for a consideration against one joint tort feasor will release all others, whether it was the intention of the parties to do so or not. A mere covenant not to sue, which does not contain words amounting to a release of the cause of action or which nega-

> tives such release, is not effective for the purpose of releasing other joint tort feasors. (17 Fed. Supp. 820, 824-825.)"

It is stated in the opinion that although the so-called covenant did not use the word "release", it nevertheless was a release in legal effect.

The case of *Urton v. Prince,* 57 Cal. 270, closely resembles the one at bar. That was an action against one Price, a lecturer, and his sponsor, the Mechanics Institute, for injuries caused by the explosion of chemicals during a chemistry lecture. The plaintiff signed an instrument not unlike the one in the present controversy. In consideration of $500.00, plaintiff "for himself, his heirs, executors and administrators, released the Mechanics Institute from all causes of action, from the beginning of the world to the date of these presents" and particularly from claims arising from injuries "for which I brought suit No. 16,340 in the District Court of the Fourth Judicial District of California." Plaintiff then stipulated that the action be discontinued and dismissed as to the Mechanics Institute and a dismissal was thereafter entered. The court held that a joint tort feasor was relieved of all liability by virtue of the above instrument and the dismissal pursuant thereto. In that connection, the court said:

> "We entertain little doubt that the transaction was intended to constitute a satisfaction for all the injuries received by plaintiff. Whether so or not, the plaintiff, as appears from the finding of the jury and the release, has been fully compensated by the payment of a sum equal to all the damages he has suffered. He cannot recover more from anyone. 'It is to be observed' says Dr. Cooley in his work on the Law of Torts, p. 139, 'when the bar accrues in favor

of some of the wrong-doers by reason of what has been received from or done in respect to one or more others, that the bar arises not from any particular form that tne proceding assumes, but from the fact that the injured party has *actually received satisfaction*, or what in law is deemed the equivalent' " (page 272).

In the case of *Flynn v. Manson*, 19 Cal. App. 400, 126 Pac. 181, we find another case fully supporting petitioner's position. There, plaintiff sued Manson, Casey, Van der Naillen, and other former members of the Board of Public Works, to recover damages for negligence. Thereafter plaintiff and defendant Manson signed a contract whereby, in consideration of $250.00, plaintiff released Manson "from all claims and causes of action set forth in the complaint herein." As in the case at bar, the release sought to reserve plaintiff's rights against the other defendants. The action was dismissed as against Manson. When the case came to trial, the court held that the release of Manson discharged the remaining defendants, notwithstanding the saving clause. The court more readily reached this conclusion, it declared, since the demand, as here, was unliquidated. Therefore, any payment, however small, in consideration of a release, constituted compensation for the alleged injuries. The attempted reservation of rights against others was held ineffective as being repugnant to the legal effect and operation of the release.

A very clear statement of the law in California is contained in *Chetwood v. California National Bank*, 113 Cal. 414, 45 Pac. 704, in which a judgment was involved, awarded against several persons, and arising out of a tort. Some of the persons paid a sum of money and the

cause was dismissed as to them. The question with which the court was confronted was whether the payment was made upon the judgment, as the release was, doubtless, in consideration of that payment.

The Supreme Court of California, Mr. Justice Henshaw writing the opinion, used the following pertinent language:

> "Where a joint action is brought against two or more for trespass done, and all are held liable, the judgment must be for joint damages. All legal consequences of a joint judgment must follow. Each is liable for all the damage which the plaintiff has sustained, without regard to their different degrees of culpability, and a release to one discharges all."
>
> "The plaintiff in this case, by accepting $27,500 from the two defendants for and on account of the joint trespass of the three, and by releasing them, has released his claim against the third. In Urton v. Price, 57 Cal. 270, an action for personal injuries occasioned by the explosion of chemicals, was brought against Price, the demonstrator at a lecture. The charge was negligence. Thereupon plaintiff added the Mechanics' Institute, under whose direction the lecture was given, as a defendant. Subsequently plaintiff filed a stipulation discontinuing and dismissing the action as to the defendant the Mechanics' Institute. Thereafter the defendant Price filed an amended answer, setting forth that, after the commencement of the action, plaintiff had accepted $700 from the Mechanics' Institute for and on account of the injury he had received, and had dismissed the suit as to the institute. Judgment was entered in the trial court that plaintiff had received satisfaction for his injuries, and, upon appeal to this court, it was held that this constituted a release of plaintiff's claim against Price."

"In Tompkins v. Clay Street Hill R. R. Co., 66 Cal. 163, 4 P. (1165) 1167, plaintiff sued the Sutter Street Railroad Company and the Clay Street Hill Railroad Company for damages for personal injury, alleging that it was occasioned by their joint negligence. The court refused to instruct the jury as follows:

"'The defendant Clay Street Hill Railroad Company, by its supplemental answer, avers that plaintiff has released and discharged the Sutter Street Railroad Company. If you find from the evidence that the plaintiff has received any sum of money whatever from the defendant Sutter Street Railroad Company, as compensation for the injuries received by her, and has released and discharged the defendant the Sutter Street Railroad Company from all claim for damages arising out of this action, then you are instructed to bring in your verdict for the defendant the Clay Street Hill Railroad Company.'"

The court reversed the judgment on the ground that the trial court should have given this instruction, because a question of fact was involved, *i. e.*, whether the circumstances showed a release.

There is another significant paragraph in this opinion:

"While plaintiff may sue one or all of joint tort feasors, and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satisfaction. Once paid for the injury he has suffered, by any one of the joint tort feasors, his right to proceed further against the others is at an end. Where several joint tort feasors have been sued in a single action, a retraxit of the cause of action in favor of one of them operates to release them all. The reason is quite

obvious. *By his withdrawal, plaintiff announces that he has received satisfaction for the injury complained of, and it would be unjust that he should be allowed double payment for the single wrong.* It matters not either whether the payment was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law a satisfaction of the claim against them all." (Italics added.)

Bogardus v. O'Dea, 105 Cal. App. 189, 287 Pac. 149, 150, was a retraxit case, in which a person, who had been named as a defendant but had not been served, paid a sum of money, after which a retraxit of the action was filed as to him. The court held that the retraxit was a release of all the defendants joining in the commission of the particular act, saying:

"The original complaint set up two distinct causes of action without attempting to state them separately. One of the causes of action so pleaded was for damages alleged to have been suffered by appellant as a result of the 'false and fraudulent representation and return' as to service of summons upon him, made, as the complaint alleged, 'with intent to deceive in order to obtain said default judgment.' According to the allegations of the original complaint, all three of the defendants joined in the commission of the tort—giving rise to this cause of action, and hence a retraxit of *the cause of action in favor of any of them operated as a release of all of them.*" (Italics added.)

Flynn v. Manson, 19 Cal. App. 400, 126 Pac. 181, 183. is another case in which the court held that the dismissal was the result of the settlement of the controversy, and released all the defendants, despite the fact that the contract contained a proviso to the effect that it was not the

intention to release "anybody else" from liability. Said the court:

> "Such a provision, says the court in Gunther v. Lee, 45 Md. 60, 24 Am. Rep. 504, 'is simply void as being repugnant to the legal effect and operation of the release itself.' So is Seither v. Philadelphia Traction Co., 125 Pa. 397, 17 A. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905, where a reservation in a release similar to the one here was considered, the court said that the plaintiff having received one satisfaction was not entitled to a second. Each joint tort-feasor 'being liable to the extent of the injury done by all, it follows as a necessary consequence that satisfaction made by one for his liability operates as a satisfaction for the whole wrong and as a discharge of all concerned. One defendant cannot make an agreement impairing the legal rights of his codefendants nor cede to the plaintiff the privilege these defendants had of availing themselves of any matter forming a legal defense to the action."

Bee v. Cooper, 217 Cal. 96, was an action for misappropriation or unlawful expenditures of moneys, against several corporate directors. Pending the action, the plaintiff accepted a sum of money from some of the directors, and agreed to dismiss the action as to them. It was argued that the agreement was merely an agreement *not to sue*. The state Supreme Court sustained Judge Yankwich who was then a judge of the Superior Court of the State of California, in and for the County of Los Angeles, and before whom the case was tried, in holding that the instrument disclosed very definitely that it was the intention of the parties thereto to settle fully, compromise, and dismiss the cause of action sued on, as to certain defendants. The dismissal, the court held, was on the merits

and was intended to settle the differences and obligations between the parties, growing out of the cause of action set forth in the complaint.

In his opinion in the trial court in the case at bar, Judge Yankwich said: "I think the instrument under consideration has more of the earmarks of a release than the one which was before me in Bee v. Cooper, *supra*, and comes clearly within the principles laid down in that case and the other cases discussed." (17 Fed. Supp. 820, 830.)

The latest decision of the California courts in which the rule for which we contend has been followed is found in the case of *Lewis v. Johnson*, 93 Cal. App. Dec. 638, 80 Pac. (2d) 90, decided May 27, 1938, cited on page 31, under Point XI, of our brief in support of the petition herein.

That action was one against several joint tort feasors, and, during the course of the trial, the plaintiff, in consideration of $6000 paid to him by one of the defendants, executed and delivered to such defendant an instrument entitled "A covenant not to sue and covenant not to sue further". As in the case at bar, a dismissal was entered as to such defendant and also like the case at bar, the instrument there involved also attempted to reserve a cause of action against the remaining defendants.

The District Court of Appeal affirmed the judgment of the trial court in holding that each of the elements necessary for a *retraxit* were present in the case and that the attempted reservation was ineffectual and void. Citing among other California cases, *Bogardus v. O'Dea*, *Flynn v. Manson* and *Tompkins v. Clay Street R. R. Company*, *supra*.

The Supreme Court of the State of California has granted the petition of the plaintiff for hearing after decision by the District Court of Appeal, and the case is now under submission in the former court.

POINT II.

The rule established by the foregoing decisions of the courts of the state of California and followed by the District Court in the case at bar, is, we respectfully submit, controlling in this court:

Erie Rd. Co. v. Harry J. Tompkins, ... U. S. ....., 82 Cal. Ed. 787, dated April 25, 1938.

Conclusion.

It is therefore respectfully submitted that upon the authority of *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U. S. 555, cited under Point XI, this court should, for the foregoing reasons, reverse the judgment of the United States Circuit Court of Appeals, for the Ninth Circuit, and affirm the judgment of the District Court for the Southern District of California, Central Division.

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